Halsted Communications *and* Local 1430, International Brotherhood of Electrical Workers, AFL–CIO, Petitioner. Case 2–RC–23006

May 31, 2006

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held September 12, 2005, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 28 for and 24 against the Petitioner, with 5 determinative challenged ballots.

The Board has reviewed the record[1] in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations[2] only to the extent consistent with this decision, and finds that a certification of representative should be issued.

At issue are the challenges to the ballots of Contractor Technician Supervisors Jayson McCoy, Uton Cousins, and Collie Smith. The hearing officer overruled the challenges and found that these individuals were eligible to vote as dual-function employees because they regularly performed unit work. The Petitioner excepts to the hearing officer's recommendation to overrule the challenges and asserts that McCoy, Cousins, and Smith should be excluded from the bargaining unit by the clear terms of the Stipulated Election Agreement. We find merit in this exception.

When resolving determinative challenged ballots in cases involving stipulated bargaining units, the Board's function is to ascertain and enforce the parties' intent, provided that it is not contrary to any statutory provision or established Board policy. *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002). To determine whether an individual is included in the stipulated bargaining unit, the Board applies a three-step test. First, the Board must determine whether the stipulation is ambiguous. If the stipulation clearly expresses the objective intent of the parties in unambiguous terms, the Board simply enforces the agreement. If the stipulation is ambiguous, the Board continues to step two and seeks to determine the parties' intent through usual methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still remains unclear, the Board will reach step three and employ its standard community-of-interest test to determine the bargaining unit. Id.

To determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classification. *Bell Convalescent Hospital*, 337 NLRB 191 (2001) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find a clear intent to include those classifications that match the express language, and will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description. *Bell Convalescent Hospital*, supra at 191. If the classification is not included, and there is an exclusion for "all other employees," the stipulation will be read to clearly exclude that classification. Id.; see also *National Public Radio, Inc.*, 328 NLRB 75 (1999); *Prudential Insurance Co.*, 246 NLRB 547 (1979). The Board bases this approach on the expectation that the parties know the eligible employees' job titles, and intend their descriptions in the stipulation to apply to those job titles. *Bell Convalescent Hospital*, supra at 191.

Here, the Stipulated Election Agreement specified the following unit:

> INCLUDED: All full-time and regular part-time installation technicians, including technician trainees, employed by the Employer at and out of its facility located at 1015 Saw Mill River Road, Yonkers, NY.
>
> EXCLUDED: All other employees, including office clerical employees, managers, dispatchers, independent contractors, warehouse employees, and guards, professional employees, and supervisors as defined by the Act.

The disputed employees are contractor technician supervisors. This classification is not included in the express language of the unit description, and there is an exclusion for "all other employees." Thus, the parties' intent to exclude the disputed employees is clear. Further, the parties' stipulation is not contrary to any statutory provision or established Board policy. We will therefore enforce the clear terms of the stipulation.[3]

[1] At the hearing, the parties stipulated that Kevin Williams, one of the challenged voters, was employed in a unit classification, that he was eligible to vote, and that his ballot should be opened and counted.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the challenge to the ballot of Efrain Llano.

[3] Member Schaumber notes that in *Columbia College*, 346 NLRB No. 69 (2006), referenced in the concurrence, he dissented as to the finding that the term "faculty" in the stipulated election agreement in

The hearing officer should not have reached the dual-function issue. A dual-function analysis is a variant of the community-of-interest test,[4] and it is not applied where the parties' intent to exclude the classification is clear. *Peirce-Phelps, Inc.*, 341 NLRB 585, 585–586 (2004) (hearing officer erred by addressing the merits of the dual-function issue where the stipulation clearly excluded disputed employee); *Bell Convalescent Hospital*, supra (same).[5]

For these reasons, we sustain the challenges to the ballots of McCoy, Cousins, and Smith. The remaining challenged ballot is no longer determinative,[6] and we accordingly find that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 1430, International Brotherhood of Electrical Workers, AFL–CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All full-time and regular part-time installation technicians, including technician trainees, employed by the Employer at and out of its facility located at 1015 Saw Mill River Road, Yonkers, NY.
>
> EXCLUDED: All other employees, including office clerical employees, managers, dispatchers, independent contractors, warehouse employees, and guards, professional employees, and supervisors as defined by the Act.

Dated, Washington, D.C. May 31, 2006

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, concurring.

I agree with my colleagues that the challenges to the ballots of Jayson McCoy, Uton Cousins, and Collie Smith should be sustained. Contrary to my colleagues, however, I do so not because the unit description unambiguously excludes them, but rather because the evidence fails to establish that they share a community of interest with the other unit employees.

As the majority states, under *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002), the Board uses a three-step test to resolve determinative challenges in cases with stipulated bargaining units. Under the first step, the Board determines whether the unit description is clear and unambiguous. "If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement." Id. If, however, the description is ambiguous, the Board applies the normal principles of contract interpretation, including an examination of extrinsic evidence to determine the intent of the parties. Lastly, if the parties' intent is still unclear, the Board will apply community-of-interest principles to determine whether the disputed employees belong in the unit.

Contrary to my colleagues, I do not find the unit description to be clear and unambiguous. The description includes "[a]ll full-time and regular part-time installation technicians." It is uncontroverted that the contractor technician supervisors involved herein perform some installations every day. Thus, they arguably could be considered "part-time installation technicians," and properly included in the unit. The fact that they are not literally termed "part-time installation technicians" is not necessarily determinative. Indeed, employees who perform most of Employer's installations are sometimes termed "field technicians" and yet no party contends that they are excluded from the unit. Thus, unlike my colleagues, I am not convinced that the contractor technician supervisors should be excluded simply because they are not referred to by the same name as one of the classifications in the unit description.[1]

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that case was ambiguous. In his view, that finding was inconsistent with the principles stated in the precedent applied herein. See id., slip op at 3 fn. 9.

[4] *Berea Publishing Co.*, 140 NLRB 516, 519 (1963).

[5] In *Harold J. Becker Co.*, 343 NLRB No. 11, slip op. at 1 (2004), cited by the hearing officer, the Board applied a dual-function analysis to determine whether the challenged employees were eligible to vote. Although the employees at issue in that case fell within expressly excluded classifications, the stipulated bargaining unit included "[a]ll employees of the Employer engaged in sheet metal work," and the disputed employees performed some amount of sheet metal work. Id. at 1 fn. 3. Therefore, it was necessary for the Board to apply the dual-function test to determine whether the employees in question performed sufficient unit work to warrant inclusion in the unit. *Harold J. Becker Co.* is distinguishable from the instant situation because the stipulated bargaining unit here is defined only by job classifications and not by the type of work performed.

[6] The hearing officer recommended, pursuant to the parties' stipulation, that the ballot of Kevin Williams be opened and counted. See fn. 1, supra. Because we are sustaining the challenges to the three ballots discussed above, Williams' vote alone would not affect the election results. Therefore, his ballot should not be opened and counted.

[1] See, e.g., *Columbia College*, 346 NLRB No. 69 (2006), slip op. at 3 (finding unit classifications of "independently contracted tutors" and "faculty" to be ambiguous).

My colleagues note that the unit description excludes "all other employees." However, this analysis simply begs the issue. If, as I believe, the term "part time installation technicians" arguably covers the technicians involved herein, it follows that they are arguably not within the term "all other employees."

Finally, in *Harold J. Becker Co.*, 343 NLRB No. 11 (2004), the employees fell within an expressly excluded classification. On the other hand, the unit expressly included "all employees engaged in sheet metal work," and the employees at issue performed some of the work. The Board used a "dual-function" analysis, thereby implicitly conceding that the unit description was ambiguous. My dissent in the case was simply on the "dual-function" issue.

For all of these reasons, I conclude that the unit description is not clear and unambiguous.

Secondly, the record does not include any extrinsic evidence concerning whether the unit description was intended to include or exclude the disputed employees.

Thus, I turn to the third step under *Caesar's Tahoe*: community-of-interest principles.[2] Under this step, I find that the contractor technician supervisors should be excluded from the unit. First, the contractor technician supervisors perform different functions from the unit employees because they primarily perform supervisory duties, albeit not vis-à-vis employees. These duties include: inspecting installations; inspecting vehicles; completing quality control reports and safety reports; and making sure contractor technicians are in uniform. These are the same duties performed by the technician supervisors, whom both parties stipulated were Section 2(11) supervisors, properly excluded from the unit. Indeed, the only reason the contractor technician supervisors are not likewise barred from the unit under Section 2(11) is that they do not supervise employees, only contractors.

Concededly, the contractor technician supervisors perform some of the same unit work done by field technicians. However, there is little interchange between them, the field technicians perform no supervisory duties,[3] and the contractor technician supervisors—unlike the field technicians - are salaried and attend management meetings. Therefore, I find that there is an insufficient community of interest between the contractor technician supervisors and the unit employees to warrant their inclusion in the unit. Accordingly, I join the majority in sustaining the challenge to their ballots.

Dated, Washington, D.C. May 31, 2006

Robert J. Battista , Chairman

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[2] "These factors include distinctions in the skills and functions of particular employee groups, their separate supervision, the employer's organizational structure, differences in wages and hours, integration of operations, interchange and contacts." Id.

[3] The fact that the contractor technician supervisors perform some amount of unit work is not dispositive to my analysis. See *Arlington Masonry Supply, Inc.*, 339 NLRB 817 fn. 3 (2003) (where Member Schaumber and I expressed the view that even if the employee regularly performs some bargaining unit work, it may still be appropriate "to evaluate other community of interest factors in determining whether that employee should be included in the unit").